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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 123.

E. MARX,
Plaintiff in Error,

vs.

IDA J. HANTHORN,
Defendant in Error.

Brief and Argument for Defendant in Error.

J. N. DOLPH and
GEORGE H. DURHAM,
of Counsel for Defendant in Error.

W. H. MOORE & Co., Printers, 511 Eleventh Street N. W.

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E. MARX, *Plaintiff in Error,* *vs.* IDA J. HANTHORN, *Defendant in Error.*	No. 123.

In Error to the Circuit Court of the United States for the District of Oregon.

Brief and Argument for Defendant in Error.

STATEMENT.

This is an action brought by the plaintiff in error, a subject of the Emperor of Germany, against the defendant in error, a citizen of the United States and a resident of Oregon, to recover the possession of lots 3 and 4 in block E in the city of Portland, Oregon. It is alleged in the Complaint that the plaintiff is the owner of the premises and entitled to the possession thereof and that the defendant wrongfully withholds the possession from him. (See folio 6, p. 4.) The defendant in her answer denies the allegations of the Complaint; pleads title in herself with right of possession. (See Record, folios 28 and 29, p. 10.) The replication puts in issue the new matter in the Answer.

The only claim of the plaintiff in error to the premises is under a sheriff's deed, purporting to be made in pursuance of the sale thereof for taxes on June 30, 1884. The tax sale was for $34.34.

It was stipulated upon the trial, which was by the court without the intervention of a jury, that the defendant in error was the owner in fee of the premises at the time of the assessment and sale of the same for taxes and was then still such owner, unless such sale and conveyance thereon had the effect to pass the title to the purchaser thereof, and that the premises were worth $6,000.00. (See Record, folio 35, p. 13.)

The court below found that the alleged tax sale was illegal and void; that the plaintiff was not the owner of the premises, or entitled to the possession thereof, and that defendant was the owner (See Record, folio 41, p. 24.) and judgment was rendered upon such finding on December 12, 1887; that the defendant was the owner of the premises and entitled to the possesssion thereof and for costs. (See Record, folio 57, p. 25.)

From this judgment plaintiff brought his writ of error to this court.

The only question to be determined in this court is that of the validity of the assessment and sale of the property for taxes and the force and effect of the sheriff's deed for the same executed in pursuance of the sale.

Upon the trial, after the plaintiff had introduced the sheriff's deed to his grantor for the premises made in pursuance of the sale for taxes, the defendant offered in evidence the proceedings, constituting the assessment, levy of taxes and sale of the property and conveyance thereon, which were received by the court in evidence *subject to objection for want of competency and materiality.*

The case was heard on October 22, 1886 (See Record, folio 33, p. 12.) and final judgment rendered December 12, 1887. (See folio 47, p. 25.)

At the time of the assessment and sale and of the execution of the tax deed to plaintiff's grantor a statute of Oregon (Sec. 5, act of December 18, 1865.) provided that upon the delivery of a tax deed,—

> "All the proceedings required or directed by law in relation to the levy, assessment, and collection of the taxes and the sale of the property shall be presumed regular and to have been had and done in accordance with law, and such deed shall be *prima facie* evidence of title in the grantee, and such presumption and such *prima facie* shall not be disputed or avoided except by proof of either (1) fraud in the assessment or collection of the tax; (2) payment of the tax before sale or redemption after the sale; (3) that the payment or redemption was prevented by the fraud of the purchaser; (4) that the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed on the property sold."

On February 21, 1887 the legislative assembly of Oregon passed an act amending the section containing the above quotation (Sec. 90 of the Miscellaneous Laws of Oregon) so as to make a tax deed only *prima facie* evidence of the title in the grantee and requiring—

> "The 'party claiming to be the owner as against the holder of the tax title' to tender and pay into court with his answer the amount of the taxes for which the land was sold, with interest thereon at twenty per centum per annum from the sale to the date of the deed, and the sheriff's fees for making the certificate and the deed, together with any taxes the purchaser may have paid upon the property, with interest thereon, for the benefit of the holder of said tax deed, his heirs or assigns, in case the same shall be invalid."

The following is a copy of said section 5 of the act of December 18, 1865, being—

"*Sec.* 90, title 6, of Chapter 57 of the Miscellaneous Laws of Oregon as amended by act of Act of February 21, 1887.

"*Sec.* 90. After the expiration of two years from the date of such certificate, if no redemption shall have been made, the sheriff shall execute to the purchaser, his heirs or assigns, a deed of conveyance reciting or stating a description of the property sold, as described in the assessment roll, the amount bid the year in which the tax was levied, to whom the same was assessed, that the tax was unpaid at the time of the sale, and that no redemption has been made; and such deed shall operate to convey a legal and equitable title to the purchaser, sold in fee simple, to the grantee named in such deed; upon making such deed the sheriff shall take up the certificate of sale theretofore issued to the purchaser and shall file the same with the county clerk, and the same shall be a public record; and upon the delivery of such deed, all the proceedings required or directed by law in relation to the levy, assessment and collection of the taxes, and the sale of the property, shall be presumed regular, and such deed shall be *prima facie* evidence of title in the grantee. And in any action, suit or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, the defendant, or party claiming to be the owner as against the holder of the tax title, must, with his answer, tender and pay into court the amount ot the taxes, for the payment of which the lands were sold, together with interest thereon at twenty per centum per annum, from the date of the sale to the date of the said tax deed, together with the sheriff's fees for making said certificate and sheriff's deed, and also any taxes the purchaser may have paid on said lands, with interest thereon, from the date of payment to the date of filing said answer, for the benefit of the holder of said tax deed, his heirs or assigns in case said tax title should fail in said action, suit or proceeding."

After the passage of the Act of February 21, 1887, and on March 23, 1887, while this cause was still pending and undecided in the court below, the defendant brought into court and tendered the plaintiff $50.60 in payment of what was due him on account of such tax deed, and commenced suit in equity in the United States Circuit Court for Oregon to quiet her title to the lots in question.

The questions considered and decided by the court below, so far as they are now material in this cause, were:

First. Whether the tax deed under the Act of 1865 was conclusive as to the regularity and validity of the assessment and sale of the property it purported to convey?

Second. Whether the provision of the statute in question as to the effect of the tax deed became a part of the contract between the State and the purchaser at a tax sale which could not be impaired by subsequent legislation or whether it was a rule of evidence only which the legislature could change at pleasure, and whether the competency and materiality of the evidence offered to show the irregularity and illegality of the proceedings relating to the assessment of the property, levy of the tax and sale of premises were to be determined by the statute in force at the time of the sale or by the statute as amended by the Act of February 21, 1887?

Third. Whether the proceedings concerning the assessment of the property, the levy of the tax and the sale of the premises were legal and valid?

The court held that the statute in force at the time of the sale of the premises entered into and became a part of the contract and that such contract could not be impaired by subsequent legislation. The court further held that the owner of the property could not be precluded from showing the invalidity of the tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of the tax thereon, and the sale thereof on that account.

As we will show hereafter the Supreme Court of Oregon has since decided that the statute was a mere rule of evidence, subject to change at the discretion of the legislature.

The plaintiff in error filed in the court below an assignment of errors which is found on pages 42, 43 and 44 of the Record. The specifications are numerous, but may be condensed and the questions presented considered under the following heads:

First. Were the proceedings prior to the execution of the deed had in accordance with law and sufficient to pass the title?

Second. Did the Amendatory Act of February 21, 1887 furnish the rule for the construction of the tax deed and the determination of the question as to the competency and materiality of the evidence submitted to overcome the presumption arising from the deed as to the regularity and validity of the previous proceedings?

Third. If the Act of February 21, 1887 did not furnish such rule was the evidence offered to overcome the presumption raised by the introduction by the sheriff's deed competent and material?

I.

Upon the question of the legality of the assessment, levy and sale little is necessary, but to refer to the statement of the learned judge who tried the case in the court below and the proceedings concerning the assessment and sale, as set forth in the bill of exceptions. The premises were owned by Ida *J.* Hanthorn and had for years been assessed to her and she had paid the taxes thereon. They were listed upon the assessment roll for the year in question as the property of Ida *F.* Hanthorn, the tax remaining unpaid, the premises were entered on the delinquent tax list as the property of Ida F. Hawthorn. The warrant for the collection of the tax, issued against the property of Ida F. Hawthorn, the law required it to be satisfied out of her personal property, if any could be found before the real estate was levied upon and the property was advertised and sold as the property of Ida F. Hawthorn. The lots were not separately assessed as required by the laws of Oregon.

Those laws provided that—

> "*Section 2770*, Hill's Code. The assessor shall set down in the assessment roll, in separate columns, and according to the best information he can obtain—
>
> * * *
>
> "4. The full cash value of each parcel of land taxed;"

The assessment of the lots in question, as appeared by the delinquent tax roll upon which the warrant for the collection of the tax was issued and to which it was attached, was against Ida F. Hawthorn, and not against Ida J. Hanthorn, the owner.

This assessment was void, the warrant was a nullity, and the advertisement and sale illegal. The sheriff, under the warrant, could not have legally sold the personal property of Ida F. Hawthorne to satisfy the tax, because she was not liable for the tax. He could not have sold the personal property of Ida J. Hanthorn for that purpose, because his warrant did not run against her personal property, and we think it equally clear that a warrant attached to a delinquent list upon which the property in question appears to be assessed to a stranger and not to the owner, and which could not be executed against personal property, could not be levied upon real estate. If the original assessment could be sustained every subsequent step in the proceeding was clearly illegal and invalid.

The following are the sections of the Oregon statutes providing for the delinquent tax list, the warrant thereon and prescribing the manner of its execution:

"HILL'S CODE.

"SEC. 2814. It shall be the duty of the county clerk of each county, after the return of delinquent taxes as made by the sheriff thereof on the first Monday of April of each year, within two days thereafter, to make from said delinquent tax roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots, if the same can be made, *and to whom such taxes are charged* and deliver the same to the sheriff of the county, with a warrant attached thereto, under his hand and the seal of the county court, in the name of the State of Oregon, commanding said sheriff *to levy on the goods and chattels of such delinquent tax payer* and if none are found then upon the real property set forth in said tax list, or so much thereof as shall satisfy the amount of taxes so charged, with costs and expenses, and said sheriff be required to pay over all moneys so collected by the first Monday in July thereafter."

"SEC. 2815. A warrant for the purpose of collecting delinquent taxes shall be deemed an execution against property, and shall have the force and effect thereof against any person, firm, or corporation upon *whom such taxes are levied or charged on the roll* (the delinquent roll) and shall be executed and returned in like manner, except as in this chapter otherwise provided."

The learned judge who tried this case in the court below, in his opinion, referring to these proceedings, said:

> "From these (the proceedings constituting the assessment, levy of taxes and the sale of the property, and the conveyance thereon) it appears that on August 27, 1883, the premises were listed by the assessor of Multnomah county on the assessment roll thereof for taxation in that year as the property of Ida F. Hanthorn, and valued at $2,200; that on October 17, 1883, the entry on the assessment roll concerning said property was transcribed onto the tax roll of said county by the clerk thereof, and on the same day the taxes for school, State, and county purposes, amounting to $34.32, were levied on said property and extended on said tax roll by the county court of said county, and the sheriff thereof commanded, by a warrant endorsed thereon, signed by the county clerk and sealed with the seal of said court, to collect said taxes by demanding payment of the same and making sale of the goods and chattels of the persons charged therewith; that the sheriff, George C. Sears, to whom the said warrant was directed, having returned that the tax levied on said property was unpaid and delinquent, the latter was, on April 22, 1884, entered on the delinquent tax roll of said county by the clerk thereof as the property of Ida F. Hawthorn, and a warrant endorsed thereon, signed by said clerk and sealed with the seal of said county, commanding said sheriff to levy on the goods of the delinquent tax payer, and in default thereof on the real property mentioned in said tax list, or sufficient thereof to satisfy said taxes, charges, and expenses; that afterward said sheriff returned that he received said delinquent tax list and warrant on April 22, 1884, and, in pursuance thereof and in default of personal property, he levied on said lots three and four and advertised and sold the same on June 18, 1884, as the property of Ida F. Hawthorn, to J. E. Bennett for $37.51, the amount of said delinquent tax and costs and expenses thereon; that on July 29, 1886, George C. Sears, as ex-sheriff of Multnomah county, executed and delivered to said Bennett a deed for the premises, in which

the proceedings concerning the assessment of said property, the levy of the taxes thereon, the non-payment and delinquency of the same, and the sale of the property therefor were substantially recited, except that it does not thereby appear that the premises were entered on the delinquent tax list or advertised or sold as the property of Ida F. Hawthorn, but as that of Ida F. Hanthorn; that on July 30, 1886, Thomas A. Jordan, as sheriff of said Multnomah county, by A. W. Witherell, deputy, executed and delivered to said Bennett a deed of the premises containing the same recitals as the one from Sears."

* * * * * *

"It appears from the delinquent tax roll that this property belonged to Ida J. Hawthorn, and from the return of the sheriff it appears that it was so advertised and sold, while the fact is it belonged to Ida F. Hanthorn, and was so assessed, except that 'J' was used as the initial of the middle name instead of 'F.'

"The deed recites that the sale was made in pursuance of a warrant to the sheriff to collect the delinquent taxes of Ida F. Hanthorne by the sale of her goods and chattels, and, in default thereof, by the sale of the lots in controversy, describing them; that the notice of the sale was duly given and a certificate thereof given to the purchaser, but the name of the owner in the notice must have been the same as that on the delinquent tax roll, Ida J. Hawthorn, from which it was made, and the return of the sheriff so states. The certificate of sale is not produced. Presumably it was delivered to the sheriff by the purchaser when he obtained his deed. It is not filed with the proceedings, but the name of the owner, as stated therein, must be the same as in the delinquent tax-roll and notice.

"How the name came to be Ida F. Hanthorne in the sheriff's deed instead of Ida J. Hawthorn, as in the delinquent tax list, notice, and certificate of sale, is a question not now necessary to consider, except that it does not appear to have been legally done. If the plaintiff shall be injured or lose her property thereby the parties to the transaction may be liable under § 109 (Or. Laws, 771) for double damages and costs of suit. To deliberately declare or recite in a deed that certain property was sold for taxes as the property of one person, when in fact it was advertised and sold as that of another, so as to make the deed conform to the assessment and the actual ownership of the property, and thereby preclude the owner from showing the truth thereabout, may prove to be a 'fraudulent act' within the statute, for which a sheriff and his bondsmen would be liable."

A failure to perform any of the acts required by statute to divest the title to property avoids the sale of lands.

Williams *vs.* Payton, (4 Wheat., 79.)
Early *vs.* Doe, (16 How., 610.)

The requisition of the statute as to giving notice must be strictly construed.

Moore *vs.* Brown, (4 McLean, 211.)

The purchaser at a tax sale takes no title unless due notice of the sale has been given.

Nelson *vs.* Goebel, (17 Mo., 161.)

The requisite notice must be given according to statute.

Lagrone *vs.* Rains, (46 Mo., 536.)

Without notice to the owner land cannot be taken from him.

O'Byrne *vs.* Philadelphia, (93 Pa. St., 225.)
Wistar *vs.* Philadelphia, (86 Pa. St., 215.)

Without notice to the owner land cannot be taken from him *per legem terrae.*

Abbott *vs.* Lindenbower, (42 Mo., 168.)

Where the notice is merely constructive, and the act ministerial and summary, the law as to the notice must be strictly followed.

II.

Upon the question of the presumptions raised by the tax deed as to previous proceedings, the learned judge, in his opinion in this case said:

> "On these facts the question arises, Is a tax deed conclusive evidence under the statute of title in the grantee to the premises therein granted, notwithstanding it appears from the prior proceedings that the property was advertised and sold not as the property of the owner to whom it was assessed, but as that of another?
>
> "Land occupied must be assessed in the name of the owner or occupant, but unoccupied land, if the owner is unknown, may be assessed without naming any owner. (Or. Laws, 750, § 7; 755, § 35.) This property was assessed to the owner and presumably was occupied. It appears to have been assessed to Ida F. Hanthorn and the taxes regularly paid by her from 1878 to 1882, inclusive.
>
> "The delinquent tax roll on which the sale of property is made must contain the description thereof found in the assessment and tax rolls and the name of the person taxed therefor if therein specified. (Or. Laws, 764, § 76, 77.) And generally the statute relating to taxation provides or plainly indicates that when the owner of property is known it must be assessed in his name or that of the occupant, if there be one, and that such name becomes and is a part of the description of the premises, and as such should be carried through all the subsequent proceedings, and particularly the notice and certificate of sale.
>
> "I am unable to say that the change of the name of the person taxed in the proceedings subsequent to the tax roll and prior to the execution of the deed brings the case within either of the four grounds specified in the statute on which the deed may be avoided. If either, it must be the first one—'fraud in the assessment or collection of the tax.' Now, fraud is not to be inferred from an act which on any reasonable hypothesis may have been innocently done. The change in the name may

have and most likely did occur through mistake resulting from carelessness and without any wrongful purpose or intent.

"In Kelly *vs.* Herrel, (10 Saw., 169,) I held that this statute, in making a tax deed conclusive evidence of the title of the grantee, except in the four particulars mentioned, goes in some respects beyond the power of the Legislature.

"Following the ruling in McCready *vs.* Sexton, (29 Iowa, 356,) and the comment in Cooley on Taxation (356) and Constitutional Limitations (368), it was then said that such a deed cannot be made conclusive evidence of the existence of any essential step or fact in the transaction without violating the fourteenth amendment, which forbids a State 'to deprive any person of property without due process of law.'

"The true rule on the subject seems to be that the Legislature may make a tax deed conclusive evidence of the regularity of the prior proceedings as to all non-essentials or matters of routine which rest in mere expediency; acts which need not have been required in the first place—as the affidavit of the sheriff to the delinquent list—and which the Legislature may by a curative act excuse when omitted. But the owner of property cannot be precluded from showing the invalidity of a tax deed thereto by proving the omission of any act essential to the due assessment of the same, the levy of the same, the levy of a tax thereon, and the sale thereof on that account. As to the performance of these acts and the facts necessary to constitute them, the deed can only be made on *prima facie* evidence, (Cooley on Taxation, 521.)

"I think due and reasonable notice of the sale of property for a delinquent tax is generally regarded as necessary to the validity of such sale. Probably no State in the Union authorizes such a sale without requiring public notice of that fact to be given; and in my judgment such notice ought to contain the name of the owner or person to whom the property is assessed. Any one knows, who is at all conversant with the subject, that in looking at a notice of the sale of property for delinquent taxes a person naturally runs his eye along the list of names rather than the figures and abbreviations indicating the location and quantity of the property; and if he does not find his name there or that of any one whom he may represent, he at once concludes that no property in which he is interested is included in the list.

"But, admitting that the name of the owner is not a necessary part of the notice to be given of the sale of land for delinquent taxes, and that it is sufficient if the statute requires nothing more than a description of the property by metes and bounds or a reference to the public surveys or the lot and block, in case of town property, yet where the statute directs the name to be published the owner has a right to assume that it will be given. Under these circumstances the publication of the name as a part of the notice becomes material, and the omission of it, in my judgment, renders the notice invalid; but where, as in this case, the name of the owner is not only omitted from the notice but another and different one given, the same is actually false and misleading.

"It is true that 'Hanthorn' and 'Hawthorn' are almost identical in orthography. But they are two distinct and well-known English names, quite different in sound and suggestion—as much so as Sawyer and Sayer. Neither is it a case of the mere misspelling of a name, as *C*inclair, *Sy*nclair, or Sincla*re* for Sinclair, or Mac*F*erson or MacP*u*rson for MacPherson, in which the name intended is preserved in the sound and even suggested to the eye. It is not a case of *idem sonans*, by any means, but the substitution of one well-known name for that of another, which, though similar in composition, is unlike in sound and suggestion.

"Such a notice, in my judgment, is no notice. Indeed it is worse. It is a false notice. A sufficient notice being a material part of a sale, and a sale being an essential part of the proceeding on which the sheriff's deed is based, the want of it may be shown to invalidate the same, and on this conclusion as to the law of the case the defendant is entitled to a finding in her favor."

If the Amendatory Act of February 21, 1887 did not prescribe the rule for the construction of the tax deed in this case, then we insist that Sec. 9, Chap. 57, Gen. Laws of Oregon, is unconstitutional, in so far as it attempts to make the recitals of a tax deed conclusive as to essential matters.

Kelly *vs.* Herrall, 10, Sawyer, 169,

"If any given step or matter in the exercise of the power to tax, (as for example, the fact of a levy by the proper authority) is so indispensable that without its performance no tax can be raised, then that step or matter, whatever it may be, cannot be dispensed with, and with respect to that, the owner cannot be concluded from showing the truth by a mere legislative declaration to that effect."

McCready *vs.* Sexton & Son, (29 Iowa, 386.)
Desty on Taxation, 953; Cooley on Taxation, 2d Edition, 298 and 521.
Milliken *vs.* Patterson, (91 Ind., 515.)
Davis *vs.* Minge, (56 Ala., 121.)
Dickinson *vs.* Acosta, (15 Fla., 615.)
Stoudenmire *vs.* Browd, (48 Ala., 699.)
Abott *vs.* Lindenbower, (42 Mo., 162.)
" " " (46 " 291.)
Lamb *vs.* Farrell, (21 Fed. Rep., 5.)
Newell *vs.* Wheeler, (48 N. Y., 491.)

From a careful consideration of the above authorities we deduce the following propositions:

First. The deed is conclusive evidence of the performance of all the routine matters in which the public are interested, and many of the acts which under the old rules of evidence would render the deed voidable.

Second. The deed is *prima facie* evidence of all jurisdictional facts and essential acts, the omission of which would render the deed void.

Third. What are jurisdictional facts depend upon the construction given to the statute by the courts of the various states.

In interpreting the Oregon statutes it was decided in Kelly *vs.* Herrall (*supra*) that the following are the essential or jurisdictional facts:

1. The assessment of the property.
2. The levy of the tax thereon.
3. The issue of a warrant for the non-payment of the same.
4. The sale of the property thereon.

The court intimates that there may be others also.

The following additional cases are cited, which bear upon the constitutionality of similar laws:

Wantland *vs.* White, (19 Ind., 471.)
Powers *vs.* Fuller, (30 Ia., 476.)
Corbin *vs.* Hill, (21 Ia., 70.)
McNamara *vs.* Estes, (22 Ia., 246.)
Groesbeck *vs.* Seely, (13 Mich., 329.)
White *vs.* Flynn, (23 Ind., 46.)
Wright *vs.* Cradlebaugh, (3 Nev., 341–9.)
Little Rock, etc., R. R. Co. *vs.* Payne, (34 Am. Rep., 55.)
Shackleford *vs.* Hooper, (65 Ga., 366.)

Judge COOLEY, in Cooley on Taxation, page 521, says:

"That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law and justice; it is not within the power of any American legislature to deprive one of his property by making an adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible additional facts which would make out title.

"It may make the tax deed conclusive of everything, except the essentials."

Subsequent to the decision in this case in the court below, in the Supreme Court of Oregon, in Strode *vs.* Washer, (17 Or. Rep., 50,) these various provisions of the Oregon statutes were construed, we quote from the syllabus:

"In an action to determine the title to certain realty claimed under a tax deed, evidence tending to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum was excluded; *held* error, even under a statute making a deed evidence of the regularity of an assessment.

"Miscellaneous Laws of Oregon, chapter 57, section 90, which provides that a tax deed shall be conclusive evidence of the regularity of the levy, assessment, collection of taxes and sale of property, was amended in 1887 so as to destroy the conclusive effect of the tax deed in these several proceedings; *held* this amendment does not impair the obligation of contracts as to purchasers at sales made prior to the amendment, but simply changes the rule of evidence."

In passing upon the question as to how far the tax deed was conclusive as to the regularity and validity of the proceedings prior to the execution of the deed, the court said:

> "It was claimed by the appellant's counsel that the delinquent tax list was defective and that the warrant for the collection of the taxes was invalid and the notice of the sale wholly insufficient.
>
> "But, the respondent's counsel contends that none of the defects claimed affect the validity of the tax deed; that the statute in force at the time of the sale of lots afforded a presumption in favor of the regularity of the deed which could not be disputed by proof of any of the matters complained of and that the amendment of said section 90, and consequent repeal of its provisions relating to the conclusive effect of the deed, could not affect the right of the respondent under it without impairing the obligation of contracts."
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> * * * *
>
> "It would, doubtless, be a wholesome and safe rule to establish that the legislature has power to declare that a neglect to perform any act relating to the assessment and collection of taxes *that it had the right to dispense with in the outset* should not defeat the sale of the property for non-payment thereof; but the attempt to dispense with the assessment of the property or levy of the tax, and allow an enforcement of a pretended tax would be sanctioning an arbitrary exaction. It would not be a tax levied in pursuance of law, as provided in effect by the constitution of the State.
>
> "I think, therefore, that at least the invalidity of the assessment and levy are always open to inquiry in an action relating to the title to the property claimed under a tax deed and that a statutory enactment precluding such enquiry would be a nullity."

Upon the propositions that the statute providing what effect the tax deed should have as evidence, was a rule of evidence subject to change by law and that the Act of February 21, 1887 became a rule of evidence for the trial of causes involving the legality of tax sales prior to its enactment, the court said:

"*Construction of Act of 1887, Amending Section 90, Chapter 57, Miscellaneous Laws.*—The question as to the effect of the amendment of said section 90, chapter 57, Miscellaneous Laws, is, however important, in order to determine whether or not the respondent is entitled to the benefit of the said tender. The power of the legislature to repeal a statute, and thereby cut off all inchoate rights derived from it, except so far as restricted by the Federal and State Constitutions, is undoubted. The repeal obliterates the statute as completely as though it had never been passed. A right which has been so perfected as to enable it to stand independent of the statute remains unaffected by the repeal. But rights which are executory merely are lost, unless preserved by a saving clause. (*Butler vs. Palmer*, 1 Hill, 324.) The amendment of said section 90, and consequent repeal of certain of its provisions, as before mentioned, destroyed the conclusive effect of a tax deed as evidence of the regularity of the levy, assessment, collection of the taxes, and the sale of the property in any case. It no longer confines the right to dispute or avoid the presumption of the regularity of these proceedings to the cases specified in said section,—viz., fraud in the assessment or collection of tax; payment of the tax before sale or redemption after the sale, and the payment or redemption was prevented by the fraud of the purchaser; that the property at the time of the sale was not liable; and that no part of the tax was levied or assessed upon the property sold,—but allows it to be disputed and avoided in any case in which the law would adjudge an irregularity sufficient to render the proceedings a nullity.

"The proceedings referred to are presumed to be regular in both cases, but, in the former case, the presumption cannot be overcome, except by proving the specific matters above set out, while in the latter it may be overcome by proving any matters sufficient for that purpose. To the extent here indicated, the former statute is repealed by the later one; and if the amendment is construed as applicable to cases where the sale has been made and the deed executed prior to its adoption, and that would have the effect to impair the obligation of a contract, it would, so far be void.

"It must be conceded that, if there were no statute creating a presumption in such cases, the holder of a tax deed could establish no title to the premises by virtue thereof, without proof that every requirement of the statute, concerning the assessment of the tax and enforcement of its payment, had been complied with. He is entitled to the benefit of the presumption, because the legislature, on account of public policy, has said he should be. No one would contend that the common law would recognize the acquisition of title to property, under statutory proceedings, until it was proved that they were duly had. The owner could not be divested of title, in such a case, without a strict compliance with the terms of the statute; and proof of such compliance would have been essential to establish that a change of ownership had been effected. The question is, whether, after a statute has been enacted shifting the *onus* of such proof, it can be repealed or changed so as to affect the rights of a purchaser at a tax sale, where the tax was levied, the sale made, and the deed executed during the life of the statute, without destroying vested rights in property.

"This identical question in principle was determined in *Smith vs. Cleveland*, (17 Wis., 573.) There a similar statute was repealed by the legislature, saving acts done or rights accrued or established, and providing that every such act or right should remain as valid and effectual as if the provision so repealed had remained in full force. Subsequently the legislature passed another act, in which it was declared that any deed executed prior to its passage, upon the sale of any land for the non-payment of taxes, should be *prima facie* evidence only of the regularity of all proceedings requisite to the legal and effectual execution thereof, from the valuation of the land by the assessor to the execution of such deed. The court there held that the latter statute was invalid as impairing the obligation of a contract.

"But in *Hickox vs. Tallman*, (38 Barb., 608,) a similar case, it was held that a grantee in such a deed had no vested right to the benefit of the presumptions in respect to the regularity of the sale, and all the proceedings prior thereto, authorized by the statute to be drawn in his favor; that it was competent for the legislature to change the burden of proof, in a given case, from one party, and cast it upon another, no rule of evidence at common law being changed; and this holding is approved in *Howard vs. Moot*, (64 N. Y., 262.)

"I am inclined to be skeptical upon the point that the repeal or change of said provision of statute operated to impair the obligations of the contract of purchase at the tax sale. I do not clearly comprehend that the obligations in favor of a purchaser can be, arising out of a sale *in invitum*, beyond the right to obtain the interest of the owner in the thing purchased when the requisite steps authorizing the sale have been taken.

"I am aware that certain officers of the law are invested with power, in certain cases, to sell and transfer the interest of a party in property against the will of such party, and that a rightful exercise of the power will operate to divest the title to the property out of the party, and vest it in the purchaser. But the person to be despoiled of his property in such a case does not undertake that the power will be properly exercised, nor does the officer who executes the deed. The purchaser must take the risk of that himself. The former is resistant. He says: 'You have the right to deprive me of my property against my will, provided you pursue the power conferred upon you strictly; otherwise, you are a wrong-doer.' That is the attitude he occupies, and I am unable to discover any obligation the purchaser in such case can claim the benefit of further than I have suggested,—the right to the property in case the power has been duly executed.

"The legislature of the State at one time deemed it wise and judicious to declare that upon the delivery of a tax deed the proceedings required or directed by law in relation to the levy, etc., should be presumed regular, and to have been had and done in accordance with law, and that such deed should be *prima facie* evidence of title in the grantee, 'and that such presumption and such *prima facie* evidence should not be disputed or avoided except by proof' of the four several matters before enumerated. Such became the law, and it was doubtless an advantage to purchasers of tax titles. It did not undertake to dispense with any of the requirements of the law necessary to the validity of the sale of the property for the non-payment of the tax; but by changing the *onus* to the party whose property was sought to be sequestered, and requiring him to establish the irregularity of the proceedings, if he desired to avoid their effect, and limit the inquiry to certain matters, it often enabled the purchaser to hold the property whether he was lawfully entitled to it or not. This is the vested right of property in the purchaser, it seems to me, which is contended for.

"What obligation there is in favor of the purchaser to maintain such a rule of evidence is more than I can conceive. He is deprived of no legitimate right in consequence of the change. If the power has been duly exercised, his title to the property is assured; if, on the other hand, the conditions upon which it was authorized to be exercised have not been performed, he has no right to it.

"The change in the law has removed a barrier the Legislature interposed against a full inquiry into the matter, and I do not think it has the effect to impair the obligation of any contract, although it has modified the former rule of evidence upon the subject. It follows from this view that the judgment appealed from must be reversed, and the case remanded for a new trial."

The construction here placed upon the Statute of February 21, 1887 by the Supreme Court of the State of Oregon, is a reasonable one, and is in the interest of justice. It is that that act did not impair the obligation of contracts when applied to the construction of tax deeds made in pursuance of tax sales prior to its passage, but only affected a change in the rule of evidence. The court below in this case did not pass upon the questions of the competency and materiality of the evidence submitted of the assessment, levy of the tax and sale of the premises, until months after the passage of this act, and when they were passed upon, the act in question was the rule by which their competency and materiality were to be determined. This being the case, the *prima facie* case of the legality of the proceedings made by the deed was overthrown and the assessment and sale shown to have been illegal and to be void.

No one has a vested right to have his controversy determined by existing rules of evidence. We concede that a legislature cannot, with respect to past transactions, deny all remedy, nor replace an efficacious remedy by a nugatory one, yet, we insist that they may take away the specific remedy previously existing, and substitute for it another and equally substantive remedy. The legislature may shift the burden of proof, or may alter or modify whatever pertains to the remedy merely.

> Cooley on Constitutional Limitations, 351, 368, 453, 5th Edition, * 288, * 368.
>
> Hickox *vs.* Tallman, (38 Barb., 608.)
>
> Curtis *vs.* Whitney, (13 Wall., 68.)

We submit that this is all the legislature did here. The purchaser was not deprived of his remedy. The rule of evidence was changed, somewhat; the conclusiveness of certain presumptions, which at best were of doubtful validity, were lowered to the rank of *prima facie* evidence, while the additional advantage of being able to get his money and expenses returned with twenty per centum interest, if his title fails, is guaranteed to the purchaser.

As to the weight which should be given to the decision of the Supreme Court of Oregon, construing the provisions of the Oregon statute in question. We cite the following cases:

(17 Wall., 648; 2 Black, 599; 100 U. S., 47, 52; Sharon *vs.* Hill, 22 Fed. Rep'r, 28; 10 Sawyer, 374, 30 Internal Revenue Record, 358; Raymond *vs.* Terrebonne, 28 Fed Rep'r, 773.)

J. N. DOLPH and
GEORGE H. DURHAM,
of Counsel for Defendant in Error.

ADDITIONAL POINTS.

THE FOLLOWING ADDITIONAL POINTS ARE MADE IN ANSWER TO PROPOSITIONS CONTAINED IN THE BRIEF FOR PLAINTIFF IN ERROR, WHICH WAS FILED AFTER THE FOREGOING BRIEF WAS PRINTED.

I.

THE RULE OF *IDEM SONANS*.

The rule of *idem sonans* is correctly stated in Robson *vs.* Thomas (55 Mo., 582), cited by attorneys for plaintiff in error, where "Mathews" and "Mather" were held not *idem sonans*, as follows:

> "Words are *idem sonans* when the attentive ear finds difficulty in distinguishing them when pronounced; or common and long continued usage has, by corruption or abbreviation, made them identical in pronunciation."

And in the case of Gagen *vs.* The People (58 Ill., 160), cited for plaintiff in error, as follows:

> "In such cases the rule is that the incorrect spelling will be disregarded unless the difference in sound in the two names is apparent."

Hanthorne and Hawthorne are two well-known English names. The difference in sound between the two is apparent and the attentive ear finds no difficulty in distinguishing them. In the brief for plaintiff in error the word, in Ward *vs.* The State (28 Ala., 53), held to be *idem sonans* with "Chambless" is "Chambles" and not "Chamble", as printed; and in Williams *vs.* Ogle (2 Str. 889), the word held to be *idem sonans* with "Segrave" is "Seagrave" not "Seograve", as printed.

II.

NOTICE OF SALE.

The cases cited on page 8 of the brief for plaintiff in error to show that a defective notice of a sale on execution does not avoid the sale are not applicable to the case at bar. Execution sales are made in pursuance of judgments rendered by courts having jurisdiction of the parties and the subject-matter and are made under the direction of the court. The reason for the rule cited by counsel is that a party aggrieved can avoid an execution sale for defective notice at any time before the time for redemption expires upon motion to set aside the sale, or where a confirmation of sale is provided for by objections to the confirmation. Sales for taxes are proceedings *in invitem*, taken by officers invested with limited ministerial and statutory powers, and the rule in such cases is, unless a different rule has been provided by statute, that strict compliance with all the provisions of law relating to the assessment, levy, warrant, notice of sale, and sale must be had.

In some of the cases cited, as in McRae *vs.* Davnier (8 Or., 63), the question decided was that a confirmation of an execution sale is conclusive as to its regularity. In some of them, as in Wood *vs.* Moorhouse (45 N. Y., 368), there was a statute providing that a defective notice should not avoid an execution sale.

The cases cited on page 24 of the brief, to the effect that the order of confirmation is conclusive of the regularity of an execution sale, have no relevancy, because it is provided by the Oregon Civil Code that the judgment of confirmation of a sale on execution shall be conclusive as to the regularity of the sale. The confirmation is made by the court which rendered the judgment upon which the execution issued, which retains for the purpose jurisdiction of the parties and the subject-matter. It is made at a time fixed by statute and the rules of the court, and either the purchaser or the judgment debtor may object to the confirmation. The court may set aside the sale and order a new execution and a resale or confirm the sale, and the judgment of the court in the matter is binding upon the parties like any other judgment of a court of competent jurisdiction, and is not open to collateral attack.

Section 2810 of Hill's Annotated Laws of Oregon, page 1305, provides that—

> "The return of the sheriff to the County Court of delinquent taxes shall be made in a tabular form, and may be varied as the facts require, but when so made shall be as nearly as may be in the following form":

Then follows a form of return which contains the names of the parties against whom the assessment and levy are made.

Section 2814, printed on page 8 of this brief, requires the names to be continued in the list to be made by the county clerk which forms part of the warrant issued to the sheriff for the collection of the taxes.

By section 2815, found on page 8 of this brief, it is declared that the warrant shall be deemed an execution.

Section 275 of Hill's Code, page 347, provides that—

> "The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain *the name of the court, the names of the parties to the action, and the title thereof, it shall substantially describe the judgment*, and, if it be for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows": * * *

Attorneys for the plaintiff in error, by quoting a portion of section 291 of the Civil Code, attempt to show that the statutes of Oregon do not require *the name* of the judgment debtor to be published in the notice of an execution sale, but if the previous clauses of the section be read in connection with the portion quoted, the falacy of the argument will be apparent.

Section 291 (Hill's Code) provides that before *sale of property on execution notice thereof* shall be given as follows:

> "In case of personal property, by posting written or printed notice of the time and place of sale in *three* public places of the county where the sale is to take place not less than three days successively."

Then follows as a second subdivision of the section the portion of the statute printed in the brief for plaintiff in error.

The argument of counsel proceeds upon the supposition that the Oregon Legislature has, in the section quoted, prescribed all the contents of the notice. But this cannot be so, or the notice of sale of personal property need not contain a description of the property to be sold, or a statement that it had been levied upon or was to be sold upon execution.

The section requires that notice shall be given of *the sale on execution*; that is, that the property is *to be sold upon the process in the hands of the officer for execution.* The execution cannot be described without giving the names of the parties to the judgment upon which it is issued. This construction is in accordance with the universal practice. The notice of an execution sale always begins with a recital that by virtue of an execution issued upon a judgment rendered, &c. (describing the judgment by naming the court in which it was rendered and the parties to it), certain property has been levied upon. These provisions of the Oregon statute justified the court below in his conclusion that the notice of sale of land for taxes should contain the name of the owner or person to whom the property is assessed.

Notice of sale is indispensable, Gibbs *vs.* Neely (7 Watts, 305); Wheatly *vs.* Torry (6 Kansas, 427); Kellogg *vs.* Hoedell (62 Barb., 280).

III.

THE EFFECT OF THE DEED AS EVIDENCE.

The cases cited on page 8 and subsequent pages of the the brief for plaintiff in error to show that irregularities in proceedings prior to the execution of the tax debt do not render the sale void so far as they are at all applicable to this case are cases arising under statutes making a tax deed conclusive as to the regularity of a sale, and are not applicable to a case in which it is incumbent upon the claimant under a tax deed to show the regularity of the proceedings.

Of these cases six are decisions of Iowa courts, and their number does not add to the weight of their authority. The Iowa Supreme Court, in these decisions, abandoned the rule laid down in McCready *vs.* Sexton (29 Iowa, 356), which was followed by the court below in this case and also in the previous decision in Kelly *vs.* Herrell (10 Saw., 169).

In Sharpleigh *vs.* Surdam (1 Flippin, 472), the act of Congress for the collection of direct taxes within insurrectionary districts (U. S. Stat. at Large, 422) was under consideration.

DeTreville *vs.* Smalls (98 U. S., 521, 526), Kelly *vs.* Saunders (99 U. S., 443), and Sherry *vs.* McKinley (99 U. S., 496), are all cases arising under said act of Congress, and the decisions are substantially to the effect that the act in question is not in conflict with any provision of the Constitution of the United States prescribing the manner in which Congress shall provide for the exercise of the power of taxation conferred upon it by the Constitution. These cases are not applicable to cases arising under State statutes alleged to be in conflict with the provisions of State constitutions.

In Shoup *vs.* C. B. U. P. R. R. Co. (24 Kansas, 561), the question decided was whether the *omission* of the name of the person to whom a tract of land was assessed from the notice of sale invalidated the tax deed under the following statute:

Section 92, Gen. Stat., 1868:

> "When any lands or town lots are offered for sale for any taxes it shall not be necessary to sell it as the property of any person or persons, and no sale of any land or town lot for taxes shall be considered invalid on account of its having been charged on the roll in any other name than that of the rightful owner; but such land must be in other respects sufficiently described on the tax roll, and the taxes for which it is sold be due and unpaid at the time of such sale."

The question in Verden *vs.* Bowers (55 Miss., 1), arose under constitutional and statutory provisions of similar character.

In Gwynne *vs.* Neiswanger (18 Ohio, 400), the question as to the sufficiency of the notice arose under a statute which provided:

"Nor shall the title conveyed by said deed (the tax deed) to the purchaser or purchasers, his or their heirs, assigns, or assignees, be invalidated or affected by any error previously made in listing, taxing, selling, or conveying said land."

Lamb *vs.* Gillette (6 McLean, 380), is not in point. The court decided that "a claim of title under a tax sale can only be sustained by showing a substantial compliance with the statute," and that under a statute making a deed *prima facie* evidence of the regularity of the proceedings.

"The deed being received in evidence, the *onus* of impunging its validity by showing that the prior proceedings were irregular and illegal rests on the other party."

In Bennett *vs.* Holmes (102 U. S., 651), cited by counsel, the question decided was that a statutory provision that "the right of entry of a party who claims under the treasurer's deed lands in Iowa sold for non-payment of taxes is barred if within five years after the deed has been executed and recorded he neither sues nor takes possession of the lands," is not in conflict with the Constitution of the United States.

In Farnsworth Co. *vs.* Rand (65 Maine, 19), it was held that a mistake in the name was cured by section 114, c. 6, R. S. of 1871, which "provides that no error, mistake, or omission by the assessors, collector, or treasurers shall render an assessment void, and remits the party to his action against the town for 'any damages he has sustained by reason of the mistakes, errors, or omissions of such officers.'"

In the Exchange Bank tax case (21 Fed. Rep., 99), the question was as to the power of the Legislature *to validate retrospectively proceedings which it might have* authorized in advance, and it is held that this may be done, although "*such legislation may operate to divest an individual of a right of action existing in his favor or subject him to a liability which does not exist originally.*"

This case and all similar cases are strong authorities to show that the Legislature may change the rule of evidence as to the effect of a tax deed, even if such change requires more of the claimant under the tax deed in order to establish his title.

The court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent rights of property. Watson *vs.* Mercer (8 pet., 88); (8 How., 163).

See as bearing on this question Denny *vs.* Bennett (128 U. S., 494); Louisiana *vs.* Mayor of New Orleans (109 U. S., 285); Railroad Co. *vs.* Alabama (101 U. S., 832); Garrison *vs.* City of New York (21 Wall., 196); Curtis *vs.* Whitney (13 Wall., 68); (8 How., 163).

It is important to determine the precise character and office of the delinquent tax roll required by the statute of Oregon. It is an original document, and wholly takes the place of the tax roll as evidence of the assessment and levy of taxes and the amount of taxes charged and the persons to whom charged; and it seems absurd to hold that however erroneous the assessment and levy may appear upon the delinquent roll the errors must be disregarded. The delinquent roll is in all respects similar to the tax roll, except that it contains only the names of tax payers who have not paid their taxes, with the assessment of their property and the amount of taxes levied against them, &c. It is of equal authority with the tax roll as evidence of the assessment and levy of the taxes.

Examining the delinquent tax roll in this case it seems to me that the court is forced to say either that the taxes against Ida J. Hanthorne were not returned as delinquent, and that the assessment of her property and the amount of taxes levied against her were not carried to the delinquent tax roll, or that the property in question appears to have been assessed and taxed to Ida F. Hawthorne: in other words, that the assessment and levy, as they appear upon the delinquent tax roll and upon which the proceedings for the collection of the taxes were taken, must be held, in determining the validity of subsequent proceedings, to be the true assessment and levy: that the tax roll and the delinquent tax roll, in determining the validity of proceedings upon the latter, must both be required to show a valid and sufficient assessment and levy.

The authorities are conflicting as to the power of a State Legislature to make a tax deed conclusive of the regularity of the assessment, levy, warrant, and sale of the property; but the Supreme Court of Oregon has followed the decisions which hold that the deed cannot be made conclusive evidence of any essential step in the proceedings, and has held that "at least the invalidity of the assessment and levy are always open to inquiry in an action relating to the title of property claimed under a tax deed, and that a statutory enactment precluding such an entry would be a nullity." Strode *vs.* Washer (17 Or., 50.) The question before the court in that case was as to the regularity and validity of the assessment, and the court was not called upon to pass upon the valitlity of such a statutory provision as to proceedings subsequent to the assessment and levy.

The decision of the Supreme Court of Oregon in Strode *vs.* Washer as to the effect of the tax deed as evidence is the law of the case. If the omission and mistakes complained of in this case would have rendered the assessment or levy invalid if the Legislature had not attempted to make the tax deed conclusive evidence of the regularity and validity of the assessment and levy they are shown to be invalid still.

The entire section should be held to be void as coming within the rule laid down in Commonwealth *v.* Hitchings (5 Gray, 482) that where the provisions of a section unconstitutional in part are so dependent and connected that it cannot be presumed the Legislature would have passed one without the other the whole is void.

IV.

The Act of February, 21, 1887.

But the question as to the validity and effect of a statute making a tax deed conclusive as to the regularity of the proceedings required for the collection of the tax is immaterial in this case; because at the time of the trial of the case in the court below that statute was not in force and the tax deed was only *prima facie* evidence of the regularity of the proceedings.

The construction placed upon the amendatory act of February 21, 1887, by the Supreme Court of the State of Oregon, in Strode *vs.* Washer (17 Or., 50), is fully sustained by the authorities. See Cooley on Constitutional Law, 351, 368, 453. 5th Edition, 288, 368. Hickox *vs.* Tallman (38 Barb., 608); Curtis *vs.* Whitney (13 Wall., 68). (64 N. Y., 268).

The authorities cited by attorneys for plaintiff in error, to show that the purchase of the property at the tax sale in this case was such a contract with the State that the legislature could not afterwards by statute change the rule as to the effect of the deed as evidence, with the exception of Smith *vs.* Cleveland (17 Wis., 556), are not in point. The reference of counsel to the opinion of Mr. Justice Miller appended to the report of the case of Smith *vs.* Cleveland is liable to be misleading. Justice Miller in his opinion did not discuss or pass upon the question here under discussion. In Garrett *vs.* Wiggins (1 Scannon, 335), it was held that a statute passed in 1829 making a tax deed *prima facie* evidence of the proceedings previous to the deed was not intended to have a retrospective operation. In the case at bar the subsequent or amendatory statute upon its face shows that it was intended to have a retrospective operation and it has been held to be retrospective by the Supreme Court of Oregon. In Corbin *vs.* Commissioners (Circuit Court D. Kansas), cited by attorneys for plaintiff in error, the question decided was not at all similar to the question involved in this case. In that case it was held that a statute which provided in effect for the return with interest of all monies paid by a purchaser at a tax sale if, by reason of invalidity or irregularity, the sale could not be consummated constituted when acted upon a contract within the meaning of Article 1, section 10, of the constitution of Kansas, and that a subsequent statute providing in effect that such purchaser should have no right to the return of his money in any case unless the Board of Supervisors should see proper to so order was void in so far as it purported to apply to pending cases and to affect pending vested rights.

In this case the subsequent statute destroyed a substantial right, the right of the purchaser at the tax sale to have the purchase money and interest refunded if the sale was not consummated.

Robinson *vs.* Hoon (13 Wis., 341); State *vs.* Commissioners (4 Wis., 414); Von Hoffman *vs.* City of Quincy (4 Wall., 235); Green *vs.* Riddle (8 Wheat., 1); Ogden *vs.* Saunders (12 Wheat., 257); Walker *vs.* Whitehead (16 Wall., 314); Sturges *vs.* Crowninshield (4 Wheat., 122); Gunn *vs.* Barry (15 Wall., 610); and State *vs.* Foley (30 Minn., 350); all relate to questions of the impairment of contracts by attempted changes of their terms, deprivation of the remedy, or of a substantial right, such as the lien of a judgment or the right to subject property to the satisfaction of a judgment which was by law subject to be taken in satisfaction thereof when the contract was entered into or the judgment rendered, but which, it was claimed, had become exempt by subsequent legislation.

In Murray *vs.* Charleston (96 U. S., 443), there was an attempt by the city of Charleston, by its ordinances, to change its contract with its creditors.

The court say, page 443:

> "We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city's contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificate of stock or city loan held by the plaintiff the city assumed to pay to him the sum mentioned in them, and to pay six per cent. interest in quarterly payments. The obligation undertaken, therefore, was both to pay the interest at the rate specified and to pay it to the plaintiff. Such was the contract, and such was the whole contract. It contained no reservation or restriction of the duty pre-

scribed. But the city ordinances, if they can have any force, change both the form and effect of the undertaking. They are the language of the promisor. In substance they say to the creditor: 'True, our assumption was to pay to you quarterly a sum of money equal to six per cent. per annum on the debt we owe you. Such was our express agreement, but we now lessen our obligation. Instead of paying all the interest to you we retain a part for ourselves, and substitute the part retained for a part of what we expressly promised you.'"

In Edwards *vs.* Kearzey (96 U. S., 595), it was held that "the remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation," and cannot be *wholly taken away or substantially impaired by subsequent legislation.*

None of these cases throw any light upon the question under consideration here.

The question in this case is not whether a purchase at a tax sale is a contract, but whether it is such a contract as precludes the legislature of a State from changing the rules of evidence governing the admissability of testimony upon a trial involving the rights of the purchaser.

In Edmonson *vs.* Ferguson (12 Mo., 344), it was held that "the act (of Missouri) of 1847, by which suits and process against volunteers who were absent from the State were suspended until the regiment returned, was constitutional."

It is the *obligation* of the contract that cannot be impaired. Laws changing remedies for the enforcement of a legal contract will be valid, even though the new remedy be less convenient than the old, or less prompt and speedy.

Cooley's Constitutional Limitations, pages 351, 352, 353, 354, 355, and cases cited.

Discussing the constitutional clause in question on page 353, Judge Cooley says:

> "And laws which change the rules of evidences relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so, too, it is plain that they are not precluded from such application by the constitutional clause we are considering."

Citing Neass *vs.* Mercer (15 Barb., 318; Rich *vs.* Flanders (39 N. H., 304); Howard *vs.* Moot (64 N. Y., 262); Sturges *vs.* Crowninshield (4 Wheat., 207); Ogden *vs.* Saunders (12 Wheat., 213); Bronson *vs.* Kenzie (1 How., 311); McCracken *vs.* Hayward (2 How., 608); Curtis *vs.* Whitney (13 Wall., 68).

The following is quoted from Cooley's Constitutional Limitations, page 457:

> "ALTERATION IN THE RULES OF EVIDENCE.
>
> "It must be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.*
>
> "These rules pertain to the remedies which the State provides for its citizens, and generally in legal contemplation they neither enter into and constitute a part of the contract nor can be regarded as being of the essence of any right which the party may seek to enforce.
>
> "Like other rules affecting the remedy, they must, therefore, at all times be subject to modification and control by the Legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden."

Citing Kendall *v.* Kingston (5 Mass., 533); Ogden *v.* Saunders (12 Wheat., 349), per Marshall, Ch. J.; Fales *v.*

Wadsworth (23 Me., 533); Karney *v.* Paisley (13 Iowa, 89); Commonwealth *v.* Williams (6 Gray, 1); Hickox *v.* Tallman (38 Barb., 608); Webb *v.* Den (17 How., 576); Pratt *v.* Jones (25 Vt., 303).

Judge Cooley, in Cooley on Taxation, pages 519 and 520, speaking of laws changing the rule of evidence as to the effect of a tax deed, says:

> "The power to enact such laws has been denied in argument, but the decisions fully sustain them. These decisions are that the statutes take away no substantial rights; they only regulate the order of proceeding in the legal tribunals, in exhibiting the evidence of substantial rights; and they rest on the solid foundation of the supreme authority of the legislature over the whole subject of evidence; an authority which is only exceeded when the legislature, going beyond all bounds, undertakes, under the pretence of prescribing rules of evidence, to take away rights without opportunity for a hearing."

Citing Stoudenmire *v.* Brown (57 Ala., 481); Davis *v.* Minge (56 Ala., 121); Oliver *v.* Robinson (58 Ala., 46); Westbrook *v.* Willey (47 N. Y., 457), in which it is held that "a tax deed, though made conclusive evidence of the regularity of the sale, is not conclusive as to the publication of the statutory notice required to cut off the right of redemption."

And in the same authority, on page 297 of the same work, citing numerous authorities, he states his conclusions, as follows:

> "1. *Conclusive Rules of Evidence.* It is within the province of the legislature to prescribe what rules shall be observed in the production of evidence in court. In the exercise of its authority over this subject, it has sometimes provided that the burden of proof should be upon one party to a suit rather than the other, and that a par-

ticular showing by a party shall make out in his favor a *prima facie* case. This it has full power to do, and it may make the rules which it prescribes apply to controversies previously in existence, even though retrospective legislation be forbidden by the state constitution. Relying upon this undoubted principle of constitutional law, the legislature has in many cases adopted enactments that certain reports, papers or other documents should be *prima facie* evidence of their own verity, and perhaps that certain proceedings which should have been taken before the report or other document was made were taken in fact, leaving the party who denies the truth of what is thus *prima facie* evidence, to make out his case affirmatively. Of the power to do this there is no question on the authorities. But the legislature cannot pass conclusive rules of evidence; that is to say, it cannot make the showing by one party to a controversy conclusive of the truth of the facts shown, thus in effect denying to the other party a hearing. Its power over the rules of evidence is a power to shape and mould, for the purposes of justice, the rules under which parties are to make a showing of their rights, and not a power to preclude their showing them. 'The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because not a law regulating evidence, but an unconstitutional confiscation of property.' The case supposed is but an illustration of the general rule, which applies as well to all the necessary and jurisdictional steps leading up to the deed. The law of the land requires that every party should have an opportunity for a trial of such rights as he claims; and there can be no trial if only one party is suffered to produce his proofs. We may say in general, therefore, that it is not in the power of the legislature to lay down conclusive rules of evidence by way of obviating defects in tax proceedings."

This precise question has never come before this court for decision. The early decisions of the court upon the constitutional provision in question were to the effect that laws changing the rules of evidence, although made applicable to existing causes of action, were not in violation of the constitution and were, therefore, valid. The legislation under consideration here comes within this rule. It is only an alteration in the rules of evidence. The line must be drawn somewhere between legislation which impairs the obligation of contracts and laws providing general rules of evidence for the trial of all causes which are not in conflict with the constitution. As well might it be held that laws providing that parties to the action or parties in interest might testify, or that colored or Indian witnesses might testify or that oral testimony should or should not be received to establish certain facts in causes, or that courts should or should not take judicial knowledge of certain facts, when made applicable to existing causes of action, impair the obligation of contracts as to hold that a law changing the effect of a tax deed as evidence is in conflict with the constitutional provision under consideration.

V.

THE SUIT IN EQUITY.

In their brief, page 26, attorneys for plaintiff in error say:

> "On March 23, 1887, the defendant in error began a suit in equity in the court below against the plaintiff in error, setting up this statute (statute of February 21, 1887) and seeking relief under it. That suit, as it appears from the opinion of the court in this case, was decided adversely to the defendant in error, and no appeal has been taken from such decision."

This is a misrepresentation. The court, in the opinion, states that such a suit was brought, and then proceeds to consider the effect of the act of February 21, 1887, as a rule of evidence *in the case at bar;* but there is no intimation that the suit in equity has ever been heard, much less has proceeded to final judgment and decree. All that appears in the opinion on the subject is as follows:

> "On March 23, 1887, the defendant commenced a suit in equity in this court against the plaintiff herein under section 500 of C. P. for the purpose of determining his claim to the premises, alleging that the tax deed under which the plaintiff claims title to the same is void on the grounds herein considered and others, and brought into court and tendered him the sum of $50.60 in payment of what was due him. I have considered whether this section 90, as amended, is applicable as a rule of evidence in the case under discussion."

At the time this case was tried in the court below section 90 of title 6 of chapter 57 of the Miscellaneous Laws of Oregon, as amended by the act of February 21, 1887, was in force. It took effect from the date of its approval.

By this section, as amended, the tax deed offered in evidence was *prima facie* evidence only of the regularity of the proceedings required by law in relation to the assessment, levy, and collection of the taxes and the sale of the property. It was necessary for the plaintiff to show a strict compliance with all the statutory steps required in the assessment, levy, notice, and sale in order to divest the owner of the real property in question. The tax deed was *prima facie* evidence of the regularity of such proceedings; but the evidence offered and introduced by the defendant was competent and admissible under the act of February 21, 1887, as construed by the Supreme Court of Oregon to overcome the *prima facie* case made by the plaintiff by the introduction of the deed.

The evidence introduced by the defendant was sufficient to overthrow the case made by the plaintiff and establish the following facts:

1. That the lots in question were not separately assessed.
2. That the property was assessed to Ida F. Hanthorne instead of Ida J. Hanthorne, the owner.
3. That on the delinquent roll the property appeared to be assessed and the taxes to be charged to Ida F. Hawthorne instead of Ida J. Hanthorne.
4. That the warrant issued for the collection required the sheriff to collect it out of the personal property of Ida F. Hawthorne, and in default of personal property to collect the taxes charged on the delinquent roll, which became a part of the process, to Ida F. Hawthorne by sale of property which it is shown belonged to Ida J. Hanthorne.

5. That the notice of sale was a notice of a sale to collect taxes charged to Ida F. Hawthorne instead of Ida J. Hanthorne.

There can be no question but that these failures to comply with the provisions of the statute rendered the proceedings void.

J. N. DOLPH.

148 US 172

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 123.

E. MARX, Plaintiff in Error,

vs.

IDA J. HANTHORN.

Reply Brief of Plaintiff in Error.

JOHN H. MITCHELL,
JOHN M. GEARIN,
Attorneys for Plaintiff in Error.

Press of McGill & Wallace, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

E. Marks, Plaintiff in Error, *vs.* Ida J. Hanthorn, Defendant in Error.	No. 123.

REPLY-BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error respectfully prays the court to permit the filing of this supplemental brief in reply to that filed by counsel for defendant in error.

In the brief filed by defendant in error in this case we find the following: "The questions considered and decided by the court below, so far as they are now material in this cause, were:

"First. Whether the tax deed under the act of 1865 was conclusive as to the regularity and validity *of the assessment and sale* of the property it purported to convey."

Defendant's Brief, page 57.

This is an error. It is an error that runs through the whole brief, furnishing a false foundation upon which to base an ingenious argument. There is no question at all in this case about the deed being conclusive of the *regularity or validity of the assessment,* and the fact of *the sale* is not disputed. The assessment roll and tax roll were each introduced in evidence at the trial in the lower court by defendant without objection from plaintiff, and they were each found to be in all respects *regular* and *according to law.*

Bill of Exceptions, Rec., 26.

Under the Oregon statute plaintiff could not have successfully objected had he desired to do so. One of the cases in which the deed is not conclusive is—

"4th. That the property was sold for taxes for which the owner of the property at the time of the sale was not liable, *and that no part of the tax was levied or assessed on the property sold.*"

Opinion, Rec., 19.

This clearly gives defendant the right to show, if he can, that there was no *assessment* and *no levy.* Under that statute defendant might have shown—

1st. Fraud in the assessment.
2d. That she had paid her tax.
3d. That she redeemed the property after sale.
4th. That she was prevented from paying or redeeming by the fraud of the purchaser.
5th. That she owed no tax.
6th. That there was no assessment.
7th. That there was no levy of the tax.

Sec. 90, page 767, Oregon Code, plffs.' brief, 4.

Bearing this in view, we proceed to a consideration of the authorities cited by counsel for defendant in error, and the positions assumed in his brief.

Counsel for defendant in error has cited in his brief numerous authorities in support of his position, that the "Notice of Sale for Delinquent Taxes" in this case was defective, and that the legislature had no constitutional right to bar inquiry into that fact. These authorities are cited without quoting from them at all, except Kelly *v.* Herrall, 10 Saw., 169 (a decision by Judge Deady), some sections from Cooley on Taxation, and Strode *v.* Wascher (17 Ore., p. 50). The claim is made in the brief that the authorities cited and not quoted from sustain counsel's position. An examination of these authorities will show that such is not the case. We ask the court's indulgence while we examine them separately as cited. Beginning on page 11 of the brief of defendant in error, the first case cited is Williams *v.* Payton (4 Wheat., 79).

This was a case that came to this court from Kentucky. There was no statute in that State declaring the deed even *prima facie* evidence of anything; and this court held that the statute providing for sale of property for taxes having prescribed the *only* way in which the sale should be made, the one claiming under the tax deed must show that *that* mode was adopted and no other. The case is clearly not applicable here.

The next case is that of Early *v.* Doe, 16 Howard, 610. This case came up from the District of Columbia. There was no question raised in it of a statute of repose or of making the deed *prima facie* or conclusive evidence of any fact. The only question decided or presented was this: The statute required publication once each week for *twelve (12) weeks.* The advertisement ran *only 82 days.* Was it sufficient? This court held not. The case is not in point.

The next case cited is Moore *v.* Brown, 4 McLean, 211—a case from Illinois. There was no statute at that time in Illinois making the deed *prima facie* or conclusive, and that question was not raised in the case. The only question presented was as to the length of time the notice of sale had been published, and the court set aside the tax deed because "*It is not denied, but admitted, that* *the land was sold for taxes* BEFORE *the expiration of the time required by the law before it could be sold.*" The question decided is not the same as here and the case is not in point.

The next case is Nelson *v.* Goebel, 17 Mo., 161. In that case there was no question of a statute creating presumptions in favor of a city tax deed, and the court says: "*There is no presumption to be made in favor of tax titles under the city ordinances.* The party relying on his tax title must, to succeed, show the proper compliance with all the necessary prerequisites." (Opinion, p. 184.) It is evident that this case has no bearing on the questions here involved.

The next case cited is O'Byrne *v.* City of Philadelphia (93 Pa. St., 225). No question was presented in that case as to any statutory presumption. There was no statute making the deed *prima facie* or conclusive evidence.

The statute provided for *two weeks'* notice of sale. The notice was published the first time January 28, and the sale took place on the first Monday in February. The court, in deciding the proceeding invalid, says:

"By no possibility could a service made January 28th be two weeks before the first Monday in February." (Opinion, p. 227.)

The next case is Wistar *v.* Philadelphia (86 Pa. St., 215). Here, also, there was no presumption in favor of the regularity of the proceedings provided by statute.

The court's decision is as follows:

"The return in this case is fatally defective for two reasons: First, it does not show that a true and attested copy of the writ was posted in a *conspicuous* part of the premises *for two weeks before the return day;* and second, it does not show publication, as required, in a daily paper for two weeks before the return day." (Opinion, p. 218.)

The next case cited by counsel is Abbott *v.* Lindenbower (42 Mo., 168). We call the court's attention to this case as sustaining *not* the position taken by defendant in error, but our position. In Missouri there was a statute somewhat similar to the Oregon statute. It allowed the tax deed to be attacked by showing:

> "1st. That the land conveyed by such deed was not subject to taxation at the time of the assessment thereof, under which assessment such sale was made.
>
> "2d. That the taxes due thereon had been paid according to law before the sale.
>
> "3d. That such land had been duly redeemed according to law before the execution of such deed."

The defendant in that case offered to show:

> "1st. That the land *had not been duly assessed* for the year 1863 at the time and in the manner provided by law."

And many others things—among which—

> "6th. *That the delinquent list was not made out and returned by the collector at the time or in the manner provided by law.*"

The court, in passing on these objections, said:

> "A valid assessment is an essential prerequisite to the exercise of the power of taxation. It is a necessary condition of an effectual transfer of title. We are of opinion further that evidence was admissible to show *that the judgment against this land had been rendered without notice to the owner thereof.*
>
> "With regard to the other matters of evidence above enumerated we are inclined to think they were not essential prerequisites to the lawful taxing power in the State, and that the act can not be declared unconstitutional, for the reason that it makes the deed conclusive evidence that all these things had been rightly done. They are matters of form, which might be taken against him by default." (Opinion, p. 168.)

It will be seen that in this case, the first cited by counsel where there was a statute making the deed conclusive, the court held that up to the entry of the "judgment against this land" (the assessment and levy of the tax) the law could not make the deed conclusive, but "with regard to the other matters of evidence" (including: "6th. *That the delinquent list was not made out and returned by the collector at the time and in the manner provided by law*"), these "were matters of form which might be taken against them by default."

This is the very thing we claim here.

The next case cited is McCready *v.* Sexton, 29 Iowa, 386. This case is relied on entirely by the court below and is urged as of controlling weight by counsel here.

With all due respect for the opinion of the lower court and for opposing counsel, we submit that this case, in so far as it is applicable here, is entirely misunderstood. It was held in McCready *v.* Sexton that *the assessment, levy of tax, issuance of warrant for collecting taxes*, and *sale* were essentials, and could not be dispensed with. But in the case at bar we are not trying to dispense with them. Defendant in error was permitted in the court below to introduce the *assessment roll and tax roll, and they were regular.* The *warrant attached to the assessment roll* was regular, and *the sale* is not disputed. That the court did not intend to hold that a *defective* notice of sale could not be made effective by statute is apparent from the opinion. After holding that these things are essentials, the court says:

"As to the time or manner in which they shall be done, the discretion of the legislature is absolute and supreme, and can not be judicially controlled or interfered with. Having the right to prescribe the manner, *it may also rightfully provide that a failure to comply with its directions as to the manner shall not defeat the end; or that no person shall question the legality of the manner, or that any subsequent act or fact shall be either prima facie or* *conclusive that the law as to time and manner was complied with.* In other words, the legislature being supreme, may prescribe the time and manner of doing the act, and may make *that or any other time or manner which the parties dying it may adopt legal and sufficient.*" (P. 390, Opinion.)

If this does not sustain our contention here, it is difficult to imagine how words could be put together so as to do so.

The next case cited is Milliken *v.* Patterson (91 Ind., 515). In that case the Indiana statute was under consideration. That statute provided that the tax deed should be "*conclusive evidence of the facts stated in the deed,*" and then gave a form of deed and what it should contain. The plaintiff introduced his tax deed and rested. The court held that the deed was neither conclusive nor *prima facie* evidence of facts not required to be in the deed by the statute, and says:

> "Taking the facts recited in the statutory form of a tax deed as conclusively true, there are still *many other important facts* which must be proved *aliunde* to establish title."

That is *all* the court decided, and how it can be of any bearing here is not apparent.

Dickinson *v.* Acosta, 15 Florida, is the next case cited. That was a decision upon the direct tax law, and the Florida Court overrules this court in De Treville *v.* Smalls.

The next case is Studenmeier *v.* Brown, 48 Alabama, 699. In that case the statute considered made the tax deed *conclusive* evidence "that the property was listed and assessed at the time and in the manner provided by law," and the court held *this provision* unconstitutional. "In this case the defendant proved that no assessment of the property had been made, and consequently that no taxes had been levied upon it." (Opinion, p. 709.) That was the only point decided, and it has no bearing here.

Abbott *v.* Lindenbower, 46 Mo., 291, is cited, but evidently through mistake, as in that case the proceedings were regular and the deed upheld.

Lamb *v.* Farrell, 21 Fed. Rep., 5, comes next. In that case there was *no warrant issued to collect the tax,* and the Federal Court bases its ruling entirely on the decision of the State Court in 32 Ark., 131, and 35 Ark., 505 (Hickman *v.* Kemper). The cases are not in point here, except, that in Hickman *v.* Kemper the court says:

> "Nor is it any substantial objection to the clerk's deed that it falsely recites that the land was assessed in the name of unknown owners. This did not prejudice defendant, *as the sale would if otherwise correct have been good whether assessed in the name of the true owner or as unknown.*"

In Newell *v.* Wheeler (48 N. Y., 491), the next case cited by counsel, the question decided was the validity of a street assessment. The ordinance provided that "all the proceedings had on levying the assessment shall have been examined and certified as correct by the street commissioner and the attorney and counsel for the city, which certificate shall be entered upon or annexed to the assessment roll, and shall be conclusive evidence as to the regularity of the proceedings." The objection to the proceedings was that the assessment was not made against the *real owner,* and the court held that the street commissioner and city attorney were not required by the ordinance to examine the records to find out who was the *true* owner, and consequently their certificate as to the regularity of the proceedings did not cover that point. The decision is not in point here on either side of the question.

In Wauthir *v.* White (19 Ind., 471), the next case cited by counsel, the point decided was this: A volunteer under 18 years of age made oath he was 18 years of age. The U. S. statute said:

> "The oath of enlistment taken by the recruit shall be conclusive as to his age."

Upon *habeas corpus* brought by his father the court said:

> "But however this may be, the legislative declaration in this case can not operate to include the parent or guardian of the minor and authorize the officer to retain him against the consent of such parent or guardian, and the case at bar does not require us to go beyond this."

In Power *v.* Fuller, 30 Iowa, 476, there was "*no assessment and there was not and never had been any assessment roll.*"

In Corbin *v.* Hill, 21 Ia., 70, the tax warrant was signed by "Ira M. Gifford, Acting County Judge, Scott Co., Iowa." R. Linderman was county judge and Gifford was clerk of the court. The court held this good, although they decided that the warrant was an essential step and must be proved. The case is of no value here.

McNemara *v.* Estes, 22 Ia., 246, was a case where the city of Keokuk sold the land for taxes, and the court says (p. 257): "The collector's deed, both by charter and ordinance, is made *presumptive* evidence of the regularity of all prior proceedings."

Under this provision "the defendant then offered to produce evidence tending to prove that *no sale* was made of said lots, as is affirmed in the collector's deed, which evidence the court refused to receive, and defendant excepted." (Opinion, 258–9.) This was rightly held error. The charter made the deed only *presumptive* evidence and, of course, it could be attacked. But the case does not apply here.

Grovesbeck *v.* Seely, 13 Mich., 329, is not in point. In Michigan the statute made deed *prima facie* evidence only, and there was a statute of limitations providing that after five years no attack could be made on the tax deed. The original owner remained in possession five years. The holder of the tax deed brought ejectment. Defendant offered to show that *there was no law for levying the tax, and no tax, in fact, was levied.* The Supreme Court said he might do so. The deed being merely *prima facie* evidence no other holding was possible.

White *v.* Flyn, 23 Ind., 46, has no bearing on the points involved here, and is not very decisive in any way. In that case the statute made the tax deed "conclusive *of the facts recited in it.*" One of the recitals was: "And it appearing from the records of said county auditor's office that the aforesaid lands were legally liable for taxation, and had been duly assessed and properly charged on the duplicate roll." The court held that this declaration was not conclusive because "the recitals in a deed must be within the scope of the powers of the officer making them." We can see no reason why this case was cited.

In Wright *v.* Cradelbaugh, 3 Nevada, 310, the land taxed belonged to the United States. It could not be taxed at all. But the State *did* tax it and sold it and the court set the sale aside. This is not in point here.

That the legislature has an undoubted right to validate proceedings such as are complained of here has been uniformly held by this court.

> "It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission, or defective performance of which is complained of, or without requiring them within the time designated."
>
> Williams *v.* Supervisors, Albany, 122 U. S., 164.

Shakelford *v.* Hooper, 65 Ga., is the last case cited by counsel on this branch of the subject. It has no bearing on the questions involved here. In that case there was no statute making the deed *prima facie* or conclusive.

A Federal Question Involved.

At the end of counsel's first brief the following authorities are cited "as to the weight to be given to the decision of the Supreme Court of Oregon construing the provisions of the Oregon statute in question" (page 24, deft's brief): 17 Wall., 648; 2 Black., 599; 100 U. S., 47–52; 22 Fed. Rep., 28; 10 Sawyer, 374; 28 Fed. Rep., 773.

None of these decisions are in any way applicable.

In considering the retrospective operation of the act of the Oregon legislature of February 21st, 1887, a Federal question is involved. That this court is not bound by, and will not follow, the decision of a State Court where a Federal question is involved, is too well settled to require a citation of authorities. (See Spencer *v.* Merchant, 125 U. S., 345; Stutsman County *v.* Wallace, 142 U. S., 293.) But of this we will speak more fully later on.

We have thus considered every authority cited by counsel in their first brief, and submit that *not one* except Kelly *v.* Herrall (10 Saw., 169, a decision by Judge Deady), and Strode *v.* Wascher (17 Oregon, p. 50), sustains counsel's position. No other court has ever held it.

We come now to the supplemental brief filed by counsel in answer to our brief in opening. This is devoted principally to the act of the Oregon legislature of February 21, 1887, and an attempt is made to show that it should have a retroactive effect.

Again counsel assumes a false premise upon which to hang an argument leading to an erroneous conclusion.

On page 35 of defendant's brief we find this:

> "*In the case at bar the subsequent or amendatory statute upon its face shows that it was intended to have a retrospective operation.*"

With the greatest respect for the judgment of the distinguished author of the foregoing, we insist that the "amendatory statute" shows no such thing, either "on its face" or otherwise. Upon a comparison of this amendatory act (see amendatory act in full, plaintiff's former brief, 25) with the section of the old law which it amends (sec. 90, chap. 6, title 57, Record, 19, and plaintiff's former brief, 4), it will be found that the first portion of the old law is preserved word for word down to the words "*in fee simple to the grantee named in such deed.*" Then the new statute injects the following:

> "*Upon making such deed the sheriff shall take up the certificate of sale theretofore issued to the purchaser, and shall file the same with the county clerk, and the same shall be a public record.*"

Is this the part which shows "on its face" that "it was intended to have a retrospective operation?" The old law did not require the sheriff to take up the certificate of sale or to file it with the clerk, or provide that it should be a public record. Under the old law the clerk had no right to receive it or officially to notice it, and he could no more cumber his records with it than he could with an almanac or newspaper.

In the case then of deeds executed before this law was passed the sheriff had no authority to take up the certificate of sale and could not legally do so, and could not file it with the clerk at all. *This* portion of the statute, therefore, could not have been intended to be retroactive. The only other change in the old law is to leave out the portion of the statute making the deed conclusive, and to add a *new* provision, directing that "in any action, suit, or proceeding for land sold for taxes, etc., * * * the defendant *must with his answer* tender and pay into court," etc. * * *

Does this show "on its face" that it was intended to be retroactive to any extent whatever, much less to be applicable to a case where suit had been brought on a tax deed to recover land included in it, and the case had been tried and submitted to the court for decision? Under this law he could not file his answer without making the tender. How is it possible to conceive that the legislature intended this to apply to a case where the answer had been filed without the tender and the case tried?

If there is one thing more apparent than another from these two inserted provisions it is that the act was to have a *prospective* and not a retroactive operation. *And no other change was made by the act.*

But there is another feature about this act which shows beyond peradventure what the legislature meant. There is a section 2 to the act which reads as follows:

> "*Sec. 2. As the present law is defective on this subject and causes hardship to the owners of property and to the State and counties, this act shall be in force from and after its approval by the governor.*"

Under the Oregon constitution the act would go into effect 90 days after its approval without this emergency clause. Why was this emergency clause put in at all if the act was to be retroactive? Why all this haste to get this law "in force" as soon as possible? What difference did it make *when* it went into effect if it was to reach back, pick up, and change the *status* of all former proceedings? It is just because it *was not* intended to so operate that this emergency clause was inserted. It was intended for the future. The legistature thought it to be a wise provision and desired that it should become operative as soon as possible. If we are correct in this it disposes of all the argument of counsel on this point, because it is the long established rule that, whether a statute impairs the obligation of contracts or not, it will not be given by the courts a retroactive operation, unless the statute so declares, or such is the clear and unmistakable intent.

Courts will not construe a statute as operating retrospectively unless there be found in the law such clear and indubitable expressions of the legislative design as preclude any other reasonable interpretation of the words used.

This court in case of Shreveport *v.* Cole (129 U. S., 36), opinion by Mr. Chief-Justice Fuller, said:

> "Constitutions, as well as statutes, are construed to operate prospectively only, unless on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question."

And it is a rule of construction that all statutes are to be considered prospective unless the language is *express* to the contrary.

Harvey *v.* Tyler, 2 Wallace, 347.

> "The general rule is that no statute is to have a retrospect beyond the time of its commencement, for the rule of law and of Parliament is that *nova constitutio futuris forman debet imponere non præteritis.* Blackstone, in his Commentaries, treats it as a first principle that all laws are to commence *in futuro* and operate prospectively. After referring to the unjust and iniquitous practice of the Roman emperor (Caligula) as to the manner of writing and publishing his laws, he observes that 'there is still a more *unreasonable* method than this, which is called making laws *ex post facto.*'"

Dash *v.* Van Kluk, 7 Johns. R., pp. 496–7.

In Bay *v.* Gage (36 Barb., 447) the question as to whether a statute should operate retrospectively or not was before the court. In passing on it the court says:

> "But I am persuaded that the amendment is not retrospective by its terms or by fair construction. *To give it that effect either the statute should so declare or such should be the undoubted or necessary inference.*"

P. 449, Opinion.

In Citizens' Gas Light Company *v.* Alden, 44 N. J. L., 648, the New Jersey court passed directly on this question in a case so similar to the one at bar that we call the court's special attention to the decision. As to the operation of the act of the legislature then under consideration the court says:

> "I agree with the judgment of the Supreme Court as to the effect of the act of April 8th, 1875, entitled a further supplement to an act concerning taxes (Rev., p. 1166), which provides 'that in all cases where public notice for a specified time is required by law to be given before proceedings are had for the public sale of lands for unpaid taxes, no certificate of sale or tax title shall be set aside and holden for naught by reason of any variance between the date of such notice and the actual publication thereof, provided that notice shall have been or shall be actually given for the specified number of days prior to such proceedings for public sale.' The words of the act doubtless make it neatly appropriate to a case with facts like those found here, and if the defects in these proceedings had arisen after its passage there could be no question as to its applicability. But I entirely agree with the judgment below that it can not relieve these proceedings from the consequences resulting from the failure to give the statutory notice. Under established rules of construction this law should be held to be *prospective* only. The stress, in the opinion below, laid upon the grammatical construction of the words 'which shall have been' as used in the act, was here criticised and remarked on as an effort to escape from a possible or probable retroactive meaning under

rules of accurate composition which do not necessarily control in the interpretation of statutes. But it is not enough that words used in an act *may* be given a retrospect without doing violence to their meaning or that such a course may coincide with their common understanding.

"Laws generally are enacted for the regulation of future affairs and conduct and to establish the basis upon which rights may thereafter under them be vested, and are not usually designed to alter or affect the quality or legal relations of past acts and concluded transactions, much less to disturb rights which have arisen under laws running concurrently with their birth. Hence we do not look for or expect in any enactment that it shall be operative as of a time prior to its own existence. *And before we are permitted to ascribe to it such purpose there must be found in the law such clear and indubitable expressions of the legislative design as preclude any other reasonable interpretation of the words used.* The rule in the courts is that retroactive effect will not be given to a statute when the words in it can be construed as designed to make it prospective only."

"Williamson *v.* N. J. S. R. R. Co., 2 Stewart Eq., 311.

"All legislation is framed, or presumed so to be, in view of this conspicuous canon of construction governing in courts where the duty of interpretation is reposed. *And when the legislature intend to give to a law of their enactment operation upon the past, they will and must do it with such choice of words as places it beyond the realm of doubt.*"

An exactly similar question was before the Supreme Court of Massachusetts in Shallow *v.* City of Salem (136 Mass., 136), and the court in passing on it says:

"But the general rule applicable to all statutes is that they are to have a prospective operation only, unless it is otherwise distinctly expressed in them, or clearly implied from the necessity of thus giving effect to their provisions." (P. 138, Opinion; Garfield *v.* Bemis, 2 Allen, 445; Bucher *v.* Fichburg R. R., 131 Mass., 156; Kelly *v.* B. & M. R. R., 135 Mass., 448.)

Foster *v.* Foster (129 Mass., 559) is the exact converse of this case. In Foster *v.* Foster the question before the court was this: The court had previously decided that a tax sale of real estate was void on account of a defect in the notice thereof. Influenced by this decision, the legislature passed an act providing—.

> "That no such sale *previously made* should be held to be invalid by reason of such defect, provided that the act should not apply to any case wherein proceedings at law or in equity had been begun involving the validity of such sale, nor to any real estate which had been alienated between a certain day (which was the date of the decision) and the passage of the act."

The Supreme Court of Massachusetts, speaking by Chief Justice Gray, decided the law unconstitutional because—

> "First. The statute assumes to take away private property without due process of law and without compensation." (P. 561, Opinion.)

The opinion is lengthy, and is a digest of the law on the question.

In the matter of the Protestant Episcopal School, etc. (58 Barb., 161), this point was passed upon.

The construction of a sewer was ordered by the common council of the city of New York. Proposals for the work were opened April 6, 1865, and contract awarded to lowest bidder. On April 13th the contract was entered into with such bidder. Between April 6th and April 13th, however, to wit, April 12th, the legislature passed an act declaring that no sewer should thereafter be constructed except according to plans devised by the Croton Aqueduct Board. The court held the act of April 12th prospective only, and that the bidder whose bid was accepted April 6th had a vested right to the contract, which could not be taken away.

On page 164 of the opinion the court says:

> "These proceedings vested in the bidder a right of which he could not be divested without compensation, and created a liability on the part of the corporation to him. The bid having been accepted, the obligations disclosed were created. * * * The act of 1865 must be construed, in reference to existing rights and liabilities, as prospective, and not retrospective. The rule is that a statute affecting rights and liabilities should not be so construed as to act upon those already existing. And it is the result of the decisions that, although the words of a statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise, unless the intention to embrace all is clearly expressed."

In Sedgwick on Statutory and Constitutional Construction (pp. 160 up to 170 and notes) we find an exhaustive discussion of this subject; and the author, after reviewing the authorities, adopts the rule claimed here by plaintiff in error.

Sutherland on Statutory Construction, section 480, and authorities there cited.

Endlich, Interpretation of Statutes, sections 272 to 279.

Counsel in his brief assumes that the amendatory act of 1887 is retroactive, and further, that when applied to the case under consideration it does not impair the obligation of any contract of the plaintiff by virtue of his purchase at the sheriff's sale; and bases this claim on the decision of the Supreme Court of the State of Oregon in the case of Strode *v.* Washer (17 Ore., 50), insisting that that decision is binding on this court.

We concede that the decisions of the highest court of a State, establishing a rule of property as to the effect of a tax deed, will be followed by this court, unless, in the case under consideration and to which the rule is sought to be applied, there is involved a Federal question. But we insist that in no case will this court follow, in opposition to its own judgment, the decisions of the Supreme Court of a State where they conflict with some provision, either of the Federal Constitution, a Federal statute, or a rule of general commercial law.

Norton *v.* Shelby Co., 118 U. S., 425–439;
Gormley *v.* Clark, 134 U. S., 338–348;
Stutsman Co. *v.* Wallace, 142 U. S., 306.

Should the act of the Oregon legislature of February 21st, 1887, be held to operate retrospectively, then when applied to the case at bar it contravenes both the XIVth Amendment and section 10, article 1, of the Constitution.

The XIVth Amendment to the Constitution provides: * * * "Nor shall any State deprive any person of life, liberty or property without due process of law."

In the consideration, therefore, of this amendatory act, two Federal questions are necessarily involved. ***First.*** Is not the effect of this amendatory act to deprive plaintiff of his "property" without "due process of law?" This being the debatable question, therefore, this court will decide it for itself, irrespective of any decision that may have been made by the Supreme Court of a State.

We insist, therefore, that when plaintiff's assignor purchased the property in question at the tax sale, paid his money, received his tax deed, and conveyed the property in question by a good and sufficient deed to plaintiff, and the plaintiff had brought ejectment for the land based on such tax deed, and the case had been tried and submitted to the court for its decision, that the latter acquired a "*property*" such as is included in, and covered by, the designation of that term in the XIVth Amendment:—of which he could not be deprived by any subsequent act of the legislature of the State, even though the act by its *express* terms had been made retroactive.

> Bell's Gap Railroad Co. *v.* Pennsylvania, 134 U. S., 239.

This results from the authority of the State to levy taxes on property within her limits and coerce payment by subjecting it to sale.

This court in Barrett *v.* Holmes, 102 U. S., 657, in discussing the question as to whether a statute of limitations *in force at the time of a tax sale* impaired the obligation of the contract of purchase, said:

> "When, therefore, the purchaser at a tax sale receives the treasurer's deed he takes it with all the advantages and disadvantages incident thereto. He knows precisely its effect, and what he must do to protect his title under it, for all this is plainly written in the law. If there should turn out to be an insuperable obstacle to his establishing his title to unoccupied lands he can not complain, for the whole subject was under the legislative control, *the rules affecting his title were proclaimed in advance, and he bought with his eyes open.* He took the risk of being able to make his deed effectual under the rules prescribed by the legislature. He gets all he bargained for. So that when the statute of limitation cuts him off, he having, as he imagined, been unable to bring this suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed."

This court has frequently held that a statute of limitation which unreasonably limits the opportunity to enforce a right by suit on a subsisting valid contract is to deprive one of "property" without "due process of law," and also to impair the obligation of a contract. (Wheeler *v.* Jackson, 137 U. S., 258; Terry *v.* Anderson, 95 U. S., 628; Mitchell *v.* Clark, 110 U. S., 633; McGahey *v.* Virginia, *In re* Brown, 135 U. S., 662.)

But equally clear is this amendatory act of the legislature obnoxious to section 10, Art. I, of the Constitution

"No State," says Sec. 10, Art. I, "shall pass * * * any law impairing the obligation of contracts."

A purchase at a tax sale, it is respectfully submitted, is a contract between the State and the purchaser, the terms of which are in part the provisions of law relating to tax sales in force when the sale is made, which are embodied into and become a part of the contract. (See Smith *v.* Cleveland, 17 Wis., 569; Cooley on Taxation, 545, and other authorities cited in former brief, pp. 27–31.)

In view of these authorities we respectfully submit the view of the court below on this question should be sustained. See Opinion, Record, 22, 23, where the court, among other things, said:

> "I have considered whether this section 90 as amended is applicable as a rule of evidence to the case under consideration. When the State sold these lots to Bennett it entered into a contract with him, the obligation of which it can not impair by any subsequent legislation. (Con. U. S., Art. I, Sec. 10.)"

There being, therefore, not merely *one* but *two* Federal questions involved in the construction of this amendatory act of the Oregon legislature, and both of these *constitutional* questions, the rule of construction adopted by the Supreme Court of the State in the case of Strode *v.* Washer, 17 Oregon, 50, can not be invoked as controlling here.

The original act is not unconstitutional either in whole or in part.

Defendant in error asks this court to declare section 90 of the tax law of 1865 unconstitutional in whole, because, as he says, it is unconstitutional in part. But his theory that it is unconstitutional in part is based solely upon the idea that it forbids inquiry into the invalidity of the *assessment* and *levy*. This, as can be at once perceived, is a mistake. The legality of the assessment and levy is, and always has been, open to inquiry under that law. For twenty-two years that law was on the statute books of Oregon. The revenues of the State had been collected by virtue of its operation. Property rights had been acquired under it. No decision of any court in the State had declared it unconstitutional, and it should not now be so declared except for grave reasons. Even the decision relied on by counsel (Strode *v.* Washer) upholds the constitutionality of the *old law.*

> "The legislature of the State at one time deemed it wise and judicious to declare that upon the delivery of a tax deed the proceedings required or directed by law in relation to the levy, etc., should be presumed regular and to have been had and done in accordance with law, and that such deed should be *prima facie* evidence of title in the grantee, and that such presumption and such *prima facie* evidence should not be disputed or avoided except by proof of any one of the four several matters before enumerated. *Such became the law*, and it was doubtless an advantage to purchasers of tax titles." (Strode *v.* Washer, 17 Oregon, p. 59.)

Counsel in his brief does not attempt to answer De Treville *v.* Smalls, Kelly *v.* Saunders, or Sherry *v.* McKinley, except to say: "These cases are not applicable to cases arising under State statutes alleged to be in conflict with State constitutions."

P. 30, Defendant's Brief.

The question naturally suggests itself, why? We imagine it will puzzle any one to answer the "why."

If the act of 1865, under which this sale was made, is unconstitutional either in whole or in part, then it must be because it conflicts with the Fourteenth Amendment, which prohibits a State from depriving any person of life, liberty, or property without due process of law.

We insist that the constitutional power of Congress and the States, respectively, to make a tax deed conclusive is identical.

No distinction can be taken between the power of a State to make a tax deed conclusive and the power of Congress to make a tax deed conclusive. The language in article V of the amendments to the Constitution, which declares that " no person shall * * be deprived of life, liberty, or property without due process of law," is in all respects similar in substance and effect, and in fact almost identical in phraseology, with the clause in the Fourteenth Amendment to the Constitution, which prohibits a *State* from depriving any person of life, liberty, or property without due process of law. Hence the same rule that would apply to the direct tax law of Congress must apply to an act of the legislature of a State making a tax deed conclusive.

The Fifth Amendment is a restriction on the power of the Federal Government, and has no reference to the States, while the Fourteenth Amendment operates solely on the States.

Kelly *v.* Pittsburgh, 104 U. S., 79.

In a word, the operative effect of the two amendments on the Federal and State Governments is precisely the same when applied to the question of taxation as well as to all other subjects.

"*Due process of law*" is the same in each case.

It is clear, therefore, the rule enunciated by this court in the direct tax cases as to the power of Congress to make a tax deed conclusive as to certain things, is applicable to the power of a State legislature to do the same thing.

What is "due process of law" as applicable to the power of a sovereign State to levy and collect taxes?

But it is well settled that neither of these provisions in the Vth or XIVth Amendment was ever intended to apply to the collection of taxes by a sovereign State in the *same sense* as to the collection of private debts.

"It has never been held," (says Judge Cooley on Taxation, 47,) "that the constitutional guarantee which has come to us from Magna Charta, and which declares that no person shall be deprived of life, liberty, or property except by the judgment of his peers or the law of the land, is applicable to the collection of a tax imposed by a sovereign State."

"Such a construction," says Judge Cooley (Cooley on Taxation, 47), referring to the claim that it could so apply, "applied in tax cases would work a thorough and radical change in the principle on which taxation is now supposed to rest. It would cripple the legislative power, and subject the action of the department whose function it is to make laws on its own views of the questions of public interest and public policy which the laws involve to possible reversal at the hands of a jury."

This court, in Kelly *v.* Pittsburg (104 U. S., 80), said:

"Taxes have not, as a general rule in this country since its independence, or in England before that time, been collected by regular judicial proceedings. The necessities of Government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is and has always been "due process of law."

The power to tax is not judicial. It is the province of the judicial power to decide private disputes between or concerning persons, but of legislative power to regulate public concerns and to make laws for the benefit and welfare of the State. The legislature therefore must determine all questions of State necessity, discretion or policy involved in ordering a tax, and in apportioning it; it must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections are to be made.

Cooley on Taxation, 43.

The revenue laws of a State may be in harmony with the Fourteenth Amendment to the Constitution of the United States, although they do not provide for the presence of a person when a tax is assessed against him, or that the tax shall be collected by suit.

McMillan *v.* Anderson, 95 U. S., 37.

This court in Palmer *v.* McMahon (133 U. S., 668–9), in defining the phrase "due process of law," as applied to taxation, said:

> "The phrase 'due process of law,' does not necessarily mean a judicial proceeding. 'The nation from whom we inherit the phrase,' 'due process of law,' said this court, speaking by Mr. Justice Miller, 'has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.' McMillan *v.* Anderson, (95 U. S. 37–41).
>
> "The power to tax belongs exclusively to the legislative branch of the Government, and when the law provides for a mode of confirming or contesting the charge imposed with such notice to the person as is appropriate to the nature of the case, the assessment can not be said to deprive the owner of his property without due process of law. Spencer *v.* Merchant, 125 U. S., 345; Walston *v.* Nevin, 128 U. S., 578.
>
> "The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all systems of taxation. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justness of the assessment, and prescribes the time during

which and the place where such complaints may be made. Hager *v.* Reclamation District (111 U. S., 701–710)."

This court in Bell's Gap R. R. Co. *v.* Pennsylvania (134 U. S., 239), said:

> "It is urged that this is a taking of the bond-holder's property 'without due process of law.' We must confess that we can not see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of 'due process of law,' when it is executed according to the customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of which is obnoxious to constitutional objection on this score."

In the Kentucky case, *supra*, this court, opinion by the late Mr. Justice Matthews, said:

> "In the State Railroad Tax Cases (92 U. S., 575–610), where the ascertainment of the taxable value of railroads was the duty of a board, as in the present case, whose assessment was challenged for the reason that the proceeding was not 'due process of law,' for want of notice and a hearing, it was said by Mr. Justice Miller, delivering the opinion of the court: "This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked."

Duly published notice to non-resident land owner in proceedings under State statute to condemn land for railroad is "due process of law."

Huling *v.* Kaw R. R. Co., 130 U. S., 559.

This court, opinion by Mr. Justice Field, in the case of Stanley *v.* Supervisors of Albany (121 U. S., 550), in discussing the nature of boards of equalization, said:

"To these boards of revision, by whatever name called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment can not be recovered back in an action at law any more than money collected on an erroneous judgment by a court of competent jurisdiction before it is reversed."

"*Due process of law*," as applied to the levy and collection of taxes, does not imply or require the right to such notice and hearing as are considered essential to the validity of the proceedings and judgments of judicial tribunals.

Cincinnati, N. O. & T. R. R. Co. *v.* Kentucky (Kentucky R. R. Cases), 115 U. S., 321.

"Due process of law," therefore, when applied to taxation, means only those usual statutory provisions which authorize assessment, levy, and sale, and under which the person whose property is assessed has his day in court for the purpose of seeking correction of mistakes in assessment and levy. This right guaranteed—the levy becomes a judgment, the warrant an execution.

In response, therefore, to the claim that the defendant's property was taken without due process of law, we invite the attention of the court to certain sections of the Oregon code, which provide as follows:

Section 19, page 752, Oregon Code of 1874.

"Each assessor shall give three weeks' public notice in some newspaper printed in his respective county; if

there be no such newspaper, then by posting up notice in six conspicuous places in his county, setting forth that on the last Monday in August the Board of Equalization will attend at the office of the county clerk of his county and publicly examine the assessment rolls and correct all errors in valuation, description, or qualities of lands, lots, and other property; and it shall be the duty of persons interested to appear at the time and place appointed; and if it shall appear to such Board of Equalization that there are any lands, lots, or other property assessed twice or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, or any lands, lots, or other property not assessed, said board shall make the proper corrections."

Section 37, page 756, provides:

"The county judge, county clerk, and assessor of the several counties of this State be and they are hereby made to constitute a Board of Equalization to examine and correct the assessment rolls of their respective counties and to increase or reduce the valuation of property assessed in the manner hereinafter provided."

Section 28, page 754, provides:

"Every assessor shall require any person liable to be taxed in his county to furnish him a list of his real estate situate in his county liable to taxation and a list of all his personal property liable to taxation in this State, and shall require such person to make oath that to the best of his knowledge and belief such list contains a full and true account of all his property liable to be taxed in such county, and if any person shall refuse to furnish such list or to swear to the same when required so to do by the assessor, such person shall forfeit and pay to the assessor for the use of the county the sum of twenty dollars," etc.

Section 63, page 762, provides:

"The county clerk of each county in this State shall within fifteen days after the apportionment of taxes make a certificate of the several amounts apportioned to be assessed upon the taxable property in his county for State, county, school, and military purposes, and deliver the same to the sheriff of the county, together with a transcript of the assessment roll, to which shall be attached a warrant in the name of the State or Oregon under his hand and the seal of the county court, commanding the sheriff to collect the taxes charged in such list, and to make the same by the sale of the goods and chattels of the respective persons named in such list if necessary," etc.

Section 64, page 762, provides:

"It shall be the duty of the sheriff upon receipt of the tax-roll from the county clerk immediately thereafter to give notice by posting up written or printed hand-bills, three in each precinct within his county, to the effect that he or his deputy will attend at the usual places of voting in each election precinct in his county for the purpose of collecting taxes," etc.

CODE OF 1874.

"SEC. 81 (766). It shall be the duty of the county clerk of each county, after the return of delinquent taxes as made by the sheriff thereof on the first Monday of April of each year, within *ten* days thereafter, to make from said delinquent tax roll a true and correct list of the taxes returned as unpaid, and a correct description of the lands or town lots, if the same can be made, and to whom such taxes are charged, and deliver the same to the sheriff of the county, with a warrant attached thereto, under his hand and the seal of the county court, in the name of the State of Oregon, commanding said sheriff *to levy on the goods and chattels of such delinquent tax-payer*, and if none are found then upon the real property set forth in said tax list, or so much thereof as shall satisfy the amount of taxes so charged, with costs and expenses, and said sheriff be required to pay over all moneys so collected by the first Monday in July thereafter."

"SEC. 82 (766). A warrant for the purpose of collecting delinquent taxes shall be deemed an execution against property, and shall have the force and effect thereof against any person, firm, or corporation upon whom such taxes are levied or charged on the roll ~~(the delinquent roll)~~ and shall be executed and returned in like manner, except as in this chapter otherwise provided."

The notice provided for in the first of these sections, as has been repeatedly held, is all that is contemplated by the constitutional provision "*due process of law*" as applied to taxation.

Hager *v.* Reclamation District, 111 U. S., 710;
Kentucky R. R. Tax Cases, 115 U. S., 321.

The Oregon statute further provides an appeal from any decision of the Board of Equalization to the courts of the State.

Oreg. Steam Nav. Co. *v.* Wasco Co., 2 Oreg., 206;
Darragh *v.* Bird, 3 Oreg., 246.

Respectfully submitted,

JOHN H. MITCHELL,
JNO. M. GEARIN,
Attorneys for Plaintiff in Error.